IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ Co.App.No. 02/2007 & C.A.Nos.356-57/2007

% **Date of Decision : May 31, 2007**

M/s Skipper Beverages Private Ltd. **Appellant**

! Through: Mr.Ratan Kumar Singh &
Mr. Ranjan Mazumdar, Adv.

Versus

$ M/s Universal Glass **..... Respondents**

^ Through: Mr.Jayant Bhushan
Sr.Advocate with Mr.Nishant
Menon & Ms.Richa Mishra

CORAM:-

*** HON'BLE MR. JUSTICE T.S. THAKUR**
HON'BLE MR. JUSTICE S.N. AGGARWAL

1.Whether reporters of Local paper may be allowed to see the judgment?
2.To be referred to the reporter or not?
3.Whether the judgment should be reported in the Digest?

Per S.N. AGGARWAL, J.

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C.A.No.357/2007

Exemption granted subject to all just exceptions.

C.A.No. 356/2007

Heard. For reasons stated in the

application which is supported by an affidavit, delay in filing of this appeal is condoned.

Application stands disposed of.

Co.App.No. 02/2007

1. The challenge in this appeal is to the order passed by the Company Judge of this Court dismissing the appellant's application (C.A.No.725/2005 in CP No. 236/2002) seeking setting aside of ex-parte winding up order passed against it by the Company Judge on 14.2.2005.

2. The factual matrix of the case giving rise to this appeal is as follows:

3. The respondent M/s Universal Glass (A division of Jagjit Industries Ltd.) was the petitioner in the winding up petition. It had filed a winding up petition and had sought winding up of the respondent company under Sections 433(c) and 434 of the Companies Act, 1956 on the ground that the said company was unable to pay its admitted

debt to the tune of Rs.20,16,455/- allegedly due as on September, 1998. This petition was filed by the respondent on 16.4.2001 which came before the Company Judge for consideration for the first time on 24.7.2001. On that day, notice of the petition was ordered to be served on the appellant, returnable on 4.12.2001. Thereafter, as the appellant could not be served with the notice of the petition, order for service by publication in 'The Statesman', English Edition for 2.12.2004 was passed on 10.8.2004. As none appeared on behalf of the appellant despite service by publication, ex-parte winding up order was passed against the appellant company and the Official Liquidator attached with the Company Court was appointed as the Provisional Liquidator with directions to take into his custody and possession assets and records of the appellant company vide order passed by the Company Judge on 14.2.2005. The appellant

thereafter filed an application (CA No. 275/2005 in CP No. 236/2006) and prayed for setting aside of the afore-mentioned ex-parte order passed against it. The ex-parte winding up order was sought to be set aside by the appellant company on the ground that it was not served with the notice of the petition at its registered office and that it was not aware about the pendency of winding up petition against it. It was stated that the affidavit of service dated 5.4.2004 filed by the respondents shows that the notices of winding up petition issued pursuant to orders dated 17.10.2003 and 19.12.2003 were not sent at the registered office of the appellant situated at Wadhwa Complex, Laxmi Nagar, Delhi. The contention of the appellant before the Company judge was that efforts to serve the appellant at its registered office by registered post should have been made before directing service by publication. It was further

stated that the company petition for winding up filed by the respondent against the appellant was not maintainable as there are contemporaneous documents to show that the parties are having serious disputes with regard to the claim raised by the respondent in the winding up petition. It was on these grounds that the appellant had prayed for setting aside of ex-parte winding up order dated 14.2.2005 passed against it. However, vide impugned order, the application of the appellant for setting aside of ex-parte order has been dismissed by the Company Judge and aggrieved by the same, the appellant has preferred this appeal.

4. We have heard the learned counsel for the parties and have also perused the record.

5. The counsel for the appellant relying upon Form 18 at Page 64 of the appeal paper book had contended that no attempt was made by the respondent to serve the appellant with the notice

of winding up petition at its registered office by registered post acknowledgment due before effecting service on it by publication. It was contended that on 17.10.2003 and 19.12.2003 when orders were passed for serving the appellant by registered post, the registered office of the appellant was situated at Wadhwa Complex, Laxmi Nagar whereas admittedly the notices were not sent at the said address and, therefore, the service by way of publication could not have been acted upon while passing the ex-parte winding up orders against the appellant company. On merits, the learned counsel had argued that there exist a bonafide dispute between the parties regarding the alleged claim of the respondent in the winding up petition and according to the counsel, it is the appellant company who has to recover huge amount from the respondent company instead of respondent making a claim against the appellant. The learned counsel

had urged that the appellant has suffered a serious prejudice by the impugned order inasmuch as the order of winding up had been passed against it without giving any opportunity of hearing to the said company. As per contra, Mr.Jayant Bhushan, Learned senior counsel who appeared on behalf of the respondent had argued that the appellant company was served with the notice of the winding up petition in March, 2003 and, therefore, the orders for service passed on 17.10.2003 and 19.12.2003 were of no consequence. The learned senior counsel had referred to the proceedings of 26.3.2003 in support of his contention relating to service on the respondent effected in March, 2003. The learned senior counsel had further argued that in case the ex-parte winding up order is set aside in the present appeal then the respondent would suffer great injustice as the clock would be set back to the start of proceedings that began in

2001. He had strongly opposed this appeal on the said ground.

6. On giving our anxious consideration to the above rival arguments advanced by the learned counsel for the parties, we could not persuade ourselves to agree with the submissions made on behalf of the respondent. A perusal of Form 18 at Page 64 of the appeal paper book would show that the appellant company had changed its registered office at Paschim Vihar, New Delhi w.e.f 20.3.2001 and to Wadhwa Complex, Laxmi Nagar, Delhi w.e.f 11.7.2003. The winding up petition was filed on 16.4.2001. The orders for service by publication was passed on 10.8.2004. The need for service by publication arose as notices sent to the appellant in the ordinary course and by registered post before that date were received back unserved with the report 'Left'. The address of the appellant given in the winding up petition at which notices

were sent was of Jhandewalan Extension and later on, on the request of the respondent, the respondent was allowed to serve the appellant at the following two addresses also pursuant to orders dated 17.10.2003 and 19.12.2003:

1. Skipper Beverages Pvt.Ltd.
3-75, KM, Hansi Hissar Road,
Hansi, Haryana.

2. Skipper Beverages Pvt.Ltd.
C-46, Greater Kailash-i,
New Delhi-65.

7. It is evident from the above that the notice for none of the dates was sent to the appellant at its registered office at Wadhwa Complex, Laxmi Nagar, Delhi before permitting the respondent to serve the appellant by publication. The contention of the learned senior counsel for the respondent that the appellant was duly served with the notice of the petition in March, 2003 itself is factually wrong. A perusal of the proceedings of 26.3.2003 (Page 53 of the paper

book) reveals a noting by the Registry in the proceedings of the said date to the effect that the registered A.D envelop sent to the appellant for 26.3.2003 was received back unserved with the remarks of the postal authority 'Left'. In view of this noting by the Registry, the order passed by the Joint Registrar on 26.3.2003 declaring deemed service of the petition on the appellant was against the record. In case appellant was served for 26.3.2003, as contended on behalf of the respondent, where was the need for passing fresh service orders on subsequent dates particularly on 17.10.2003 and 19.12.2003 before allowing service by publication. Furthermore, the order of deemed service passed on 26.3.2003 was never acted upon and, therefore, the said order even otherwise is of no consequence. Rule 28 of the Companies (Court) Rules, 1959 mandate for service of notice of the petition on the company at its registered office by

registered post acknowledgment due. It seems that the ex-parte winding up order dated 14.2.2005 was passed against the appellant company in disregard of the mandatory provision relating to service contained in Rule 28 referred above. Needless to say that the obligation of service on the opposite party lies on the person who files the petition. The respondent cannot be heard to say that more than six years have passed since the filing of the winding up petition because unless valid service is effected upon the opposite party, effective proceedings cannot take place in the matter. To the credit of the appellant, we must say that the appellant on our persuasion had agreed to deposit 50% of the principal amount claimed by the respondent in the winding up petition without prejudice to its rights and contentions in the Registry of this Court within a period of four months.

8. In view of the above and having regard to the circumstances of the case, we are of the view that the order impugned in this appeal cannot stand the test of judicial scrutiny and is, therefore, set aside. The appeal is allowed subject to the condition of appellant depositing 50% of the principal amount with the Registrar General of this Court within four months from today. No order as to costs.

S.N. AGGARWAL
(JUDGE)

MAY 31, 2007
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T.S. THAKUR
(JUDGE)